

2019 ADVANCED DUI TRIAL ADVOCACY

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DUI HOT TOPICS

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DUI Hot Topics

Blood Kit/Tube Recall Update

Becton Dickinson Recalled Blood Tubes

Becton Dickinson (BD), the company that makes blood tubes for companies that assemble and sell blood kits, recalled one lot of their blood tubes because a very small portion of the tubes have none of the additives in them. We have been informed these tubes were in BD catalog number 367001; Lot number 8187663. These tubes also have an expiration date of July 31, 2020. (See BD press release and June 12, 2019 letter included with these materials.)

The BD press release indicates only 300 of the tubes within the affected lot had no additive and that BD has recovered 199 of those tubes. We are told each BD lot has approximately 240,000 tubes in it. In an abundance of caution, BD recalled one entire lot of approximately 240,000 tubes. Accordingly, there are only 101 tubes in the lot containing around 240,000 tubes that may not have any of the additive.

Recalled Blood Kits

Here is the information we have, as of the date this handout went to print, regarding the specific blood kit companies. It is recommended that each affected agency should conduct an inventory of their blood kits and pull any recalled kits that have not been used.

Lynn Peavey

According to Lynn Peavey, only three shipments of Lynn Peavey blood kits containing the recalled blood tubes were sent to Arizona.

Two were sent to the Pima County Sheriff's Office. One shipment contained 600 kits and the other contained 100 kits. The lot number for these kits is 262892. The item number is 10087. Per Lynn Peavey, these kits were shipped on January 16, 2019.

The other shipment was to WL Gore and Associates, a private group.

Therapak

Therapak indicates only one Arizona agency received blood kits from Therapak containing the recalled blood tubes – Chandler PD (375 kits). Per Therapak, the kits were sent January 30, 2019. These were purchased from New York Police Supply.

SIRCHIE

According to the SIRCHIE representative, the only SIRCHIE kits sent to Arizona subject to the BD recall were sent ADOT. According to the property clerk at ADOT, none of those blood kits have been distributed. Accordingly, there should be no recalled SIRCHIE blood kits that were used in Arizona.

Arrowhead

According to the representative from Arrowhead Forensics only the following Arizona agencies were sent blood kits that have been recalled. Each agency should have received a recall letter from Arrowhead. Arrowhead states they will replace any of the recalled kits.

Standard AZ Kits

- DPS
- AZ Game and Fish
- Bisbee PD
- Chino Valley
- Hopi Nation
- Payson PD
- Pinal County
- Summerton
- Wickenburg
- Yavapai County
- Yuma PD

Other AZ Kits

- Douglas PD
- Kearney
- Yavapai-Apache
- Mesa PD

Per Arrowhead, only kits from five specific lots of Arrowhead blood kits were sent to Arizona. The lot numbers are below. We are told these are the only lots in Arizona that could contain the recalled blood tubes. The lot number is on a label on the end of the box.

- A-BAK-1AZ lot number 112918BAK
- A-BAK-1AZ lot number 012319BAK
- A-BAK-MESAAZ lot number 092618MESA
- A-BAS-10 lot number 012119BAS
- A-BAS-10 lot number 102318BAS

TriTech

According to the TriTech representative 1,498 TriTech kits were sent to various Arizona agencies. The TriTech lot number is 43250. TriTech states they will replace any of the recalled kits.

Here is the list of agencies who were sent recalled kits from TriTech. According to TriTech, only the listed agencies were sent recalled kits.

- ASU PD – 60 recalled kits
- Greenlee County Sheriff's Office - 50 recalled kits
- Navajo County Sheriff's Office – 20 recalled kits
- Florence PD – 25 recalled kits
- Casa Grande PD – 173 recalled kits
- Flagstaff PD – 100 recalled kits
- Coconino County Sheriff's Office – 100 recalled kits
- Prescott Valley PD – 60 recalled kits
- Sahuarita PD – 40 recalled kits
- Tempe PD – 400 recalled kits
- Maricopa PD – 200 recalled kits
- Prescott PD (11/15/2018 invoice)– 25 recalled kits
- Prescott PD (12/3/2018 invoice) – 50 recalled kits
- Paradise Valley PD – 20 recalled kits
- Surprise PD – 20 recalled kits
- Marana PD – 100 recalled kits
- Gila River – 55 recalled kits

NIK

It has been extremely difficult determining if any NIK blood kits that were sent to Arizona contained the recalled tubes. Here is the information we have.

NIK indicated we needed to contact KROLL. KROLL stated they have no way of tracking who bought NIK kits or which and how many kits are sent to Arizona. Apparently, KROLL is some sort of warehouse that uses various distributors that may sell to various agencies. KROLL states the individual law enforcement agency would have to contact the distributor the kits were purchased from. The distributor may or may not know if any of the kits had the recalled tubes

in them. The distributor should be able to tell the agency who they got the NIK kits from and then one could follow up with whoever that was.

KROLL did indicate NIK informed them none of the NIK kits that NIK had sent to KROLL to distribute contain the recalled tubes. If correct, this means if an Arizona agency bought NIK kits from KROLL or from a distributor that uses KROLL, it appears none of those NIK kits have the recalled tubes. But the KROLL representative said he does not believe KROLL is the only middleman distributor for NIK, so we cannot be certain.

So, it appears the one of the ways to determine if any of the NIK kits distributed here in Arizona contain the recalled tubes is by opening at least a sample kit from each lot and checking the tube to see if the recalled number is on it.

The only agency I am aware of that uses NIK kits is Gilbert PD. If any of you believe your agency also uses NIK kits, please let me know.

New York Police Supply

As indicated above, New York Police Supply sold some recalled Therapak kits to Chandler PD. They also sold kits to Scottsdale PD. Per New York Police Supply, none of the Scottsdale PD kits contain recalled tubes. If Scottsdale would like a letter memorializing this fact, New York Police Supply stated they would provide one.

DPS Crime Lab Statement Regarding the Recalled Tubes

The DPS Crime Laboratory Toxicology and Alcohol analysts have been fully briefed on the recent recall of lot 8187663 blood tubes from Becton Dickinson (BD). Analysts will continue to fully document the condition of a blood sample as it was received into the laboratory. As of 6/19/2019, any fully coagulated blood sample received in a grey top tube from this lot will further be documented with a phone call or email to the submitting officer. The case notes accompanying the Scientific Analysis Report will contain all documentation regarding any noted abnormalities in the condition of the blood sample (i.e. coagulated sample in a gray top tube) and/or any communication with the submitting officer. The DPS Toxicology and Alcohol analysts are available to testify on any case where a blood sample was drawn using a blood tube from the recalled lot. They will be able to provide testimony on how they know if the preservative/anticoagulant was or was not present in the blood tube at the time of the blood draw. They can also provide testimony on how the analysis was not affected if it is determined that the preservative/anticoagulant wasn't present and only refrigeration was used to preserve the sample instead. The Toxicology and Alcohol analysts regularly test blood samples from red top tubes that do not contain any preservative or anticoagulant. Please contact the analyst in your case if you have any further questions or concerns.

What Does This Mean for Our Cases?

Determine if Your Case Could be Affected

Determine whether your agency was or was not sent any of the recalled blood tubes. If it was not, none of this is relevant to your case and the issue should be precluded from trial.

Likewise, know the dates any recalled kits were shipped to your agency and when your agency pulled all unused kits. Any cases not in this timeframe cannot be affected and the issue is not relevant and should be precluded.

Similarly, the kits and the blood tubes all should have lot numbers on them. If the tubes used are not from one of the recalled lots, the tubes are not any of the recalled tubes and the issue should be precluded.

Phlebotomists

Phlebotomists should continue to follow their training and always inspect the grey top tube to ensure the chemicals are present prior to conducting the blood draw. If no chemicals are present, then the tubes should not be used.

If the phlebotomist is certain he/she did inspect the tube for the presence of the Sodium Fluoride and Potassium Oxalate, the phlebotomist should be prepared to testify to that fact in court – especially as this is now an issue.

How Would No Preservative Affect the Results?

The fact that there was no additive at all in any affected tubes should make it pretty easy for us to defend against any challenges in court. If one of the so-called "bad" tubes was used, it would have none of the additives, including the anti-coagulant. If a tube has none of the anti-coagulant present, then the blood will clot. Accordingly, if the witness from the lab testifies that the blood was not clotted, we know that there was additive in the tube and that the case at issue did not have one of the "bad" tubes.

Even if, however, none of the additive were present, it should not be a problem. The lab inspects all blood tubes for clots. If clots are present, the lab addresses the clots either by using the tissue grinder to create a whole blood sample or by using the centrifuge method (spinning it down) thus creating a serum sample. [If a serum sample is created, the lab will need to do a conversion of the BAC to whole blood.]

Additionally, fermentation would not occur. 1) We refrigerate the blood in Arizona, refrigeration inhibits fermentation/yeast growth; 2) the science verifies that fermentation will not occur - even if none of the sodium fluoride was present, talk to your expert; 3) depending

on the case, the blood may have been tested so quickly that fermentation would not occur - ask your expert about this; 4) we do not add sugar/glucose to our blood; 5) the blood tested in not post-mortem blood; and 6) the person would have candida albicans/yeast in his/her system which would make him/her very ill. Work with your expert witness. Contact Beth Barnes, the GOHS TSRP, if you want a more detailed explanation, want this written out in detail or want training for your office – for CLE credit.

Moreover, as indicated above, it is extremely unlikely that any of our cases will have one of the affected tubes with no additive.

Blood Test Results Are Not Our Only Evidence

Finally, a DUI investigation and trial is always a totality of the circumstances. The impairment observed and testified to by the investigating officers is consistent with the blood results.

A Few Quick Legal References

None of this should affect admissibility of the blood test results as all of it consists of issues of fact.

For example, the question of whether the blood tube used in the case was or was not one of the recalled tubes is a question of fact. If a recalled tube was used, the issue whether it was one of the very few that did not have any additive is a question of fact. Likewise, if there were no additive in the tube that was used, what if any affect this would have on the results is a question of fact.

It is black letter law that questions of fact are for the fact finder – the jury.

Disagreements between expert witnesses go to the weight, not admissibility.

- *State v. Velasco*, (Alday, RPI), 165 Ariz. 480, 486, 799 P.2d 821, 827 (1990).

Where there is a lack of unanimity in the scientific community on the accuracy of a breath test, "the scientific disagreement affects only the weight and not the admissibility of evidence." (Should apply to blood tests also.)

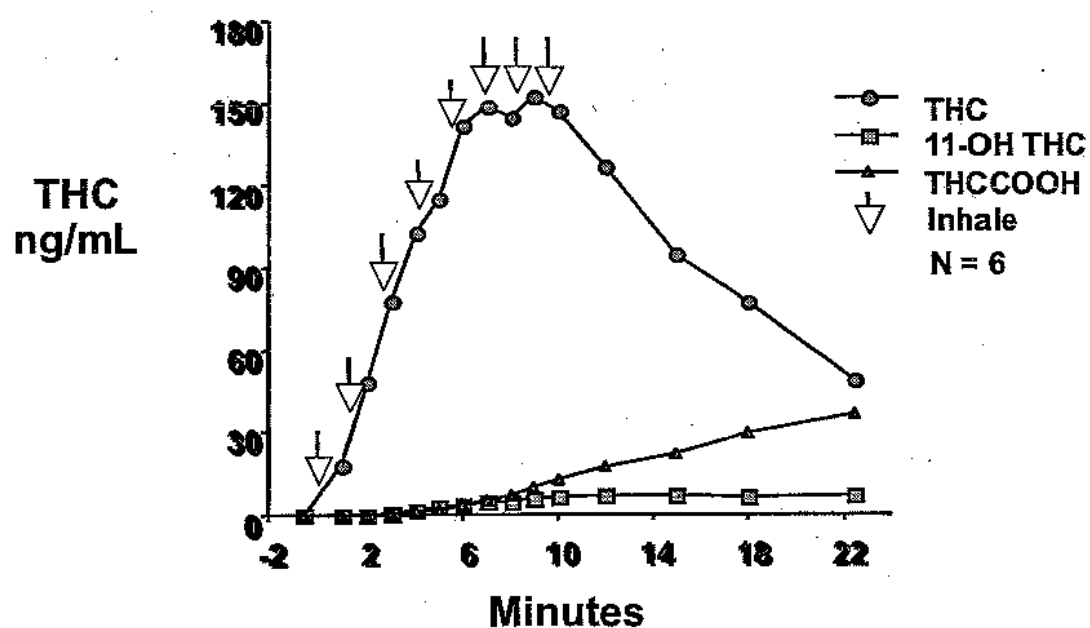
- *State v. Olivas*, 77 Ariz. 118, 267 P.2d 893 (1954).

Lack of foundation objections – person objecting is required to indicate what is lacking.

- *State v. Rodriguez*, 186 Ariz. 240 (1996)
- *State v. Reidhead*, 22 Ariz.App. 420 (1974).

Marijuana

Mean THC, 11-OH-THC & THCCOOH During Marijuana Smoking (3.55% THC)



Additional Hot Topics

- ▶ Prescriptions
- ▶ Heroin/Opioids/Fentanyl
- ▶ Meth use has increased
- ▶ Seeing Cocaine again
- ▶ Seeing LSD & PCP
- ▶ APC stationary shelter
- ▶ Vaping Alcohol
- ▶ Impairment from Imodium
- ▶ New Texting and motorized scooter statutes
- ▶ Defense Claims
 - ▶ SFSTs do Not Apply to Drugs
 - ▶ Officer's HGN Accuracy